IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 12, 2007 Session

MARTHA INES HILL v. GARY TODD HILL

Appeal from the Circuit Court for Maury County
No. 11132 Jim T. Hamilton, Judge

No. M2006-01792-COA-R3-CV - Filed January 9, 2008

Mother appeals the trial court's modification of the custody of the parties' two minor children. Father filed a petition for modification of custody; however, he admits that he mistakenly titled the pleading "Rule 60 Motion." The trial court conducted a full evidentiary hearing wherein both parties and their counsel participated and introduced evidenced. Two witnesses called by Mother were not permitted to testify. One of the excluded witnesses was the parties' twelve-year-old daughter. After refusing to permit the parties to put their daughter through the ordeal of testifying at trial, the trial court advised Mother that she could make an offer of proof but not by questioning the child. At the conclusion of the trial, the court modified the Parenting Plan by awarding Father additional parenting time, but Mother remained the primary residential parent. We have determined the pleading filed by Father, although incorrectly titled, was in substance a petition to modify the Parenting Plan, and by considering substance over form, we have concluded the erroneous title to his petition is not fatal. We also find no reversible error with the trial court's evidentiary rulings. Accordingly, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Connie Reguli, Brentwood, Tennessee, for the appellant, Martha Ines Hill.

Joseph Ward Henry, Jr., Pulaski, Tennessee, for the appellee, Gary Todd Hill.

OPINION

Gary Todd Hill ("Father") and Martha Ines Hill ("Mother") were granted a divorce in the Circuit Court for Maury County on November 15, 2005, pursuant to the trial court's final decree, in which the court incorporated a Marital Dissolution Agreement and a Parenting Plan outlining the custody of their two minor children, ages twelve and eight at the time of trial. The original Parenting Plan named Mother the primary residential parent and specified that she was to have the children 209

days per year, and Father was to have them 156 days per year. Father had responsibility of the children every other weekend from Friday at 5:00 p.m. until Monday at 8:00 a.m. Father also had the children one weeknight during the week that he did not have weekend responsibility. Holidays were to be alternated.

Six months after the divorce decree was entered, Mother filed a Rule 60 Motion to Alter or Amend the Final Decree, contending Father's child support obligation was incorrectly calculated. Mother noted that the children were with her 280 days per year and with Father the remaining 85 days per year. Based on these numbers, and the parties' respective incomes, she contended Father's child support obligation should be $2,060 as opposed to $1,224 as set by the court. Additionally, Mother contended the court failed to consider the enrichment expenses of the children, such as sports, music lessons, etc.

Three weeks after Mother filed her motion, Father filed a pleading seeking to modify the Parenting Plan. This is evident from reading the first paragraph which stated "this is a Petition for Citation for Contempt of Court, change of primary residential parent of the minor children, and for related relief." Although the content of the pleading clearly stated the relief sought, the title of the document was wholly inconsistent with the relief sought. It was titled "Rule 60 Motion to Amend the Final Decree," which was almost identical to the motion filed by Mother three weeks earlier.

In his pleading, Father contended, *inter alia,* there had been a significant change in circumstances since the entry of the order due to Mother's unstable lifestyle and her inability to provide a nurturing environment for the children. He contended the best interests of the children would be served if he were the primary residential parent. Father also sought to have Mother held in contempt for failing to comply with the parenting schedule and for making derogatory comments about him in the presence of the children.

The trial court conducted a hearing on Mother's Motion on July 14, 2006, and a full evidentiary hearing on Father's pleading on July 28. In the first hearing, the parties, through their respective counsel, presented evidence regarding the number of days the children were with each parent. In the second hearing, both parents testified, and in addition Mother sought to introduce evidence through two witnesses, Nancy Carpinko and the parties' twelve-year-old daughter. Father objected to Ms. Carpinko testifying due to the fact Mother had failed to identify Ms. Carpinko as a potential witness, as required by the local rules of court. As for the parties' twelve-year-old daughter, the trial judge refused to allow her to testify, explaining he did not want to "put her through that."

On August 3, 2006, the trial court entered an order denying Mother's Rule 60 Motion, and sustaining in part and denying in part Father's pleading. Significant to this appeal, the trial court modified the Parenting Plan, approving the plan proposed by Father, thereby awarding Father an additional weeknight every other week, half of the children's fall vacation, and half of their spring vacation. Additionally, each parent was awarded two uninterrupted weeks of summer vacation with the children. As a consequence of these modifications, each parent would be with the children an

equal number of days each year, 182.5 days. Mother, however, retained the designation as the primary residential parent.

Mother appeals contending Father did not file the appropriate petition for modification of a Parenting Plan, and thus, the original Parenting Plan should not have been modified. Mother also contends the trial court erred by excluding two of her witnesses and by denying her request to make an offer of proof concerning her daughter's testimony.

THE SUFFICIENCY OF THE PLEADINGS

The first issue to consider pertains to the never ending battle between form and substance in pleadings. Mother contends the trial court erred in modifying the parenting plan because Father's pleading was entitled "Rule 60 Motion." She correctly contends that a Rule 60 Motion is not the proper procedure for seeking modification of a Parenting Plan. Father admits the title of the document was a misnomer, a clerical mistake.[1] Nevertheless, Father contends we are required to give effect to the substance, rather than the form, of the pleading, insisting that irrespective of the scrivener's error, the document is a "petition for contempt of court, change of primary residential parenting status of the minor children, and for related relief" as stated in the first enumerated paragraph.

The Tennessee Rules of Civil Procedure "were designed to simplify and ease the burden of procedure under the sometimes harsh and technical rules of common law pleading." *Branch v. Warren*, 527 S.W.2d 89, 91 (Tenn. 1975). The movement away from the harsh and technical rules is evident from reading the first rule, which expressly states that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action." Tenn. R. Civ. P. 1. Most significant to the issue at hand is Rule 8 which states that "[n]o technical forms of *pleading or motions* are required," Tenn. R. Civ. P. 8.05(1) (emphasis added), and that all pleadings shall be so "construed as to do substantial justice." Tenn. R. Civ. P. 8.06. As this Court has previously recognized, the Tennessee Rules of Civil Procedure "do not require and, in fact, admonish courts against exalting form over substance." *Anderson v. DTB Corp.*, No. 89-172-II, 1990 WL 33380, at *2 (Tenn. Ct. App. Mar. 28, 1990).

A trial court is not bound by the title of a pleading. *Bemis Co., Inc. v. Hines*, 585 S.W.2d 574, 576 (Tenn. 1979); *Estate of Doyle v. Hunt*, 60 S.W.3d 838, 842 (Tenn. Ct. App. 2001); *Usrey v. Lewis*, 553 S.W.2d 612, 614 (Tenn. Ct. App. 1977). Rather, the court is to give effect to the pleading's substance and treat it according to the relief sought therein. *Estate of Doyle*, 60 S.W.3d at 842 (citing *Norton v. Everhart*, 895 S.W.2d 317 (Tenn.1995); *Fann v. City of Fairview*, 905 S.W.2d 167 (Tenn.Ct.App.1994); 20 Tenn. Jur. *Pleading* § 9 (1997)). As our Supreme Court has

[1]Father admits the error explaining the title or hearing "Rule 60 Motion to Amend The Final Decree" was "a proof reading error." Father contends that the mistake happened while copying the caption from Mother's pleading, which contained the identical heading. The title to Mother's Motion, according to Father, was adopted without change and was not discovered on proof reading.

explained, it is well settled that "a trial court is not bound by the title of the pleading, but has the discretion to treat the pleading according to the relief sought." *Norton*, 895 S.W.2d at 319 (citing *Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn.1983); *State v. Minimum Salary Dep't of A.M.E. Church*, 477 S.W.2d 11, 12 (Tenn.1972)). This liberal principle of construction is to be applied to pleadings as well as motions. *Anderson,* 1990 WL 33380, at *2.

In the instant case, Father's Pleading reads in pertinent part:

> I.
>
> That *this is a petition for* contempt of court, *change of primary residential parenting status of the minor children*, and for related relief.
>
> . . . .
>
> V.
>
> That *there has been a significant change of circumstances since the entry of the Order granting custody of the minor children to [Father] and that the manifest best interest of the minor children would be better served by granting and versing custody in [Father]*.
>
> The need for this modification is mandated by the behavior of [Mother], and the instability of the lifestyle that she leads, and her failure to exhibit and utilize adequate parenting skills in the raising of these children.
>
> That due to this instability and inability to provide a nurturing environment for the children to grow in that *it is mandatory for a change of custody to occur designating [Father] as the primary custodian of the minor children*.
>
> VI.
>
> That *[Father] is the fit and proper person to have the exclusive care, custody, and control of the minor child of the parties*.

(emphasis added).

Giving effect to the substance of pleadings and motions rather than to their terminology or form, as the Rules and numerous cases direct, we find no error with the trial court treating the court document titled "Rule 60 Motion" as a petition to modify a Parenting Plan.

EXCLUSION OF MS. CARPINKO'S TESTIMONY

The next issue is whether the trial court erred by not allowing Mother to call a rebuttal witness to testify on her behalf. At trial, Mother attempted to call Nancy Carpinko as a witness. Father objected because Ms. Carpinko did not appear on any witness list, and Mother's counsel failed to give notice, pursuant to the Rule 27 of the Local Rules of Court of the Twenty-Second

Judicial District (hereinafter "Local Rules of Court") that she would testify at trial. The trial court sustained the objection and Ms. Carpinko did not testify.

We review the trial court's exclusion of Ms. Carpinko's testimony under an abuse of discretion standard because "decisions regarding the admissibility of evidence rest within the sound discretion of the trial court." *Danny L. Davis Contractors, Inc. v. Hobbs*, 157 S.W.3d 414, 418-19 (Tenn. Ct. App. 2004).

The tender of Ms. Carpinko as a witness and the objection that followed is contained in the transcript of the evidence. It starts with counsel for Mother, Ms. Reguli, stating: "I call Nancy Carpinko." Counsel for Father, Mr. Henry, then states:

> Who is that? We object to that. There has been no witness list that would indicate that anybody will testify except parties. I talked specifically with Ms. Reguli about that specifically and she said that she would have her, her client, perhaps the daughter and maybe the counselor that she subpoenaed, and you get beyond that she don't need to be calling any witnesses we know nothing about.
>
> THE COURT: What about that?
>
> MS. REGULI: First of all, we didn't have that conversation. I am not sure where he had that conversation. When we were in Maury County we had discussed that if we were continue [sic] that day if everything was heard that day –
>
> THE COURT: Who is this witness?
>
> MR. HENRY: I can't just let her say that. She talked specifically the other day with Ms. Perry and told her who the witnesses were going to be. This woman was not on there. And the reason why that's important to us is if we were going to bring in character witnesses we could have brought in a boatload in here for that purpose.
>
> THE COURT: I'm not going to let you call her. . . .

Rule 27 of the Local Rules of Court states that in all civil actions set for trial on the merits, "at least seventy-two (72) hours (excluding weekends and holidays) prior thereto: (a) The names and addresses of witnesses (*other than impeachment and rebuttal witnesses*) shall be furnished to opposing counsel." (emphasis added). As the rule provides, it was not incumbent upon Mother to identify Ms. Carpinko in her Rule 27 statement if Mother called Ms. Carpinko as an impeachment or rebuttal witness. Although it is unclear from the trial transcript whether Ms. Carpinko was called as a rebuttal witness, Mother identifies Ms. Caprinko as a rebuttal witness in her appellate brief and framed the issue as, "did the trial court err in not allowing the Mother/Appellant to call rebuttal witnesses or offer proof of witnesses' testimony." For his part, Father did not contest Mother's assertion that Ms. Carpinko was a rebuttal witness. We, therefore, assume Ms. Carpinko was to be

a rebuttal witness. Because the Local Rules of Court do not require a party to list rebuttal witnesses, Ms. Carpinko should not have been excluded due to the fact her name was not on the witness list. This fact, however, standing alone is not dispositive of the issue.

The Tennessee Rules of Evidence provide that a trial court's error may not be predicated upon a ruling which admits or excludes evidence *unless* "a substantial right of the party is affected," and when the ruling excludes evidence, "the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context."[2] Tenn. R. Evid. 103. As the rule of evidence provides, the burden was on Mother to preserve the substance of the evidence Ms. Carpinko was expected to present so that this court may determine whether a substantial right has been affected. Unfortunately, once the trial court excluded Ms. Carpinko, Mother did not make an offer of proof.

The due process right to a full hearing before a court includes the right to introduce evidence and have judicial findings based upon such evidence. *Baltimore & Ohio R.R. Co. v. United States*, 298 U.S. 349, 368-69 (1936). An erroneous exclusion of evidence, however, does not require reversal unless we can determine the evidence would have affected the outcome of the trial had it been admitted. *Pankow v. Mitchell*, 737 S.W.2d 293, 298 (Tenn. Ct. App. 1987). The appellate courts cannot make such a determination without knowing what the excluded evidence would have been. *Stacker v. Louisville & N. R.R. Co.*, 61 S.W. 766, 766 (Tenn. 1901); *Davis v. Hall*, 920 S.W.2d 213, 218 (Tenn. Ct. App. 1995); *State v. Pendergrass*, 795 S.W.2d 150, 156 (Tenn. Crim. App. 1989). It is for these reasons that the burden is on the party challenging the exclusion of evidence to make an offer of proof to enable the appellate court to determine whether the exclusion of proffered evidence was reversible error. Tenn. R. Evid. 103(a)(2); *State v. Goad*, 707 S.W.2d 846, 853 (Tenn. 1986); *Harwell v. Walton*, 820 S.W.2d 116, 118 (Tenn. Ct. App. 1991).

An offer of proof should contain the substance of the evidence excluded and the evidentiary basis supporting the admission of the evidence. Tenn. R. Evid. 103(a)(2). These requirements may be satisfied by presenting the actual testimony, stipulating the content of the excluded evidence, or presenting a summary, oral or written, of the excluded evidence. *Harrison v. Laursen*, No. 01A01-9705-CH-00238, 1998 WL 70635, at *3 (Tenn. Ct. App. Feb. 20, 1998) (citing Neil P. Cohen et al., *Tennessee Law of Evidence* § 103.4, at 20 (3d ed. 1995)). Generally, the appellate courts will not consider issues relating to the exclusion of evidence when this tender of proof has not been made.

---

[2]Tenn. R. Evid. 103 provides:

a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection if the specific ground was not apparent from the context; or

(2) *Offer of Proof*. In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context. . . .

Dickey v. McCord, 63 S.W.3d 714, 723 (Tenn. Ct. App. 2001); *Rutherford v. Rutherford*, 971 S.W.2d 955, 956 (Tenn. Ct. App. 1997); *Shepherd v. Perkins Builders*, 968 S.W.2d 832, 833-34 (Tenn. Ct. App. 1997).

Our courts have recognized two exceptions to the rule requiring an offer of proof. The first is contained in the rule itself and applies when the substance of the evidence and the specific evidentiary basis supporting admission is apparent from the context of the questions. The second has been fashioned by the courts and applies when exclusion of the evidence seriously affects the fairness of the trial. *First Nat'l Bank & Trust Co. v. Hollingsworth*, 931 F.2d 1295, 1305 (8th Cir. 1991). Neither of these exceptions is in play here.

The record does not provide sufficient information for us to determine the substance of Ms. Carpinko's testimony. Accordingly, we are not able to determine whether her testimony would have affected the outcome of the trial. We therefore find no error with the trial court's decision to exclude the testimony of Ms. Carpinko.

EXCLUSION OF DAUGHTER'S TESTIMONY

We now direct our attention to the exclusion of the parties' twelve-year-old daughter who was called by Mother to testify regarding her residential preference. The trial court did not allow the child to testify, explaining he did not want to put the child through the ordeal. Mother contends it was error to exclude the daughter as a witness. Mother also contends she was erroneously deprived of the opportunity to make an offer of proof concerning the child's testimony.

The relevant portion of the transcript of the evidence reveals the following exchange when counsel for Mother announced that her next witness would be the daughter:

> MS. REGULI (Counsel for Mother): One moment. We call the daughter.
>
> MR. HENRY (Counsel for Father): I want to be heard on that for two purposes. One, I think it is inappropriate. This child is in serious analysis, whether you call it intense –
>
> THE COURT: I don't want to hear from her, I don't want to put her through that. I know what she is probably going to say, I don't want to do that. Anybody else? I will note your objection.
>
> MS. REGULI: Can we make an offer of proof for the record?
>
> THE COURT: No, ma'am. Well I guess you can. Not with her.
>
> MR. HENRY: If the Court is going to do that, I would certainly the Court has the discretion to do this, I would like you to take the child in your chambers, no lawyers,

and no parties and the first thing you need to ask her is was Ms. Reguli out in the hallway just talking to her.

THE COURT: I am not going to let any offer of proof or anything else from her. Anything else?

MS. REGULI: Nothing further.

We will first discuss whether it was error to exclude the daughter as a witness. As we stated before, "decisions regarding the admissibility of evidence rest within the sound discretion of the trial court" and our review of such decisions is subject to the deferential abuse of discretion standard. *Hobbs*, 157 S.W.3d at 419.

When considering whether to make modifications to a Parenting Plan, the trial court is to consider, *inter alia*, "[t]he reasonable preference of the child if twelve (12) years of age or older." Tenn. Code Ann. § 36-6-404(b)(14). Although the trial court did not permit the child to testify, the record reveals that the trial court considered the child's preference. This is evident from the fact Mother wanted the child to testify, Father objected to the child testifying, and the trial court's statement that it knew what she was probably going to say. Thus, it appears the trial court *considered the child's preference* as Tenn. Code Ann. § 36-6-404(b)(14) requires. Although the trial court should permit a party to present relevant and material evidence from a child twelve years of age or older, as the statute contemplates, we are unable to conclude that the trial court abused its discretion by not permitting the twelve-year-old child to testify at trial.

We now turn to the contention by Mother that the trial court erred by not allowing her to make an offer of proof when the court refused to allow the child to testify. Generally, it is error for a trial court to refuse to permit counsel to state the evidence being offered. *Alley v. State*, 882 S.W.2d 810, 815 (Tenn. Crim. App. 1994) (citing 89 A.L.R. "Offer of Proof-Ruling-Error" § 2 at 283 (1963)). The Rules of Evidence provide that error may not be predicated upon a ruling which excludes evidence "unless a substantial right of the party is affected, and . . . the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context." Tenn. R. Evid. 103(a)(2). The rule goes on to provide that once the court makes a definitive ruling excluding evidence, the court may add "any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling." Tenn. R. Evid. 103(b). Significant to the matter at issue, the rule also provides that the trial court "shall permit the making of an offer in question and answer form." *Id*. We understand the last part of the rule carries with it the implied condition precedent that a party expressly requests permission to make the offer of proof by questioning the witness.

Once the trial court ruled that it did not want to put the twelve-year-old child through the ordeal of taking the witness stand, Mother's counsel requested permission to make an offer of proof to which the trial court replied, "No, ma'am. Well I guess you can. Not with her." We understand

the trial court's statement to indicate that Mother could make an offer of proof by any proper method other than by posing questions to the twelve-year-old child.

It would be error for a trial court to refuse a party's request to make an offer of proof in question and answer form, as Tenn. R. Evid. 103(b) directs. Mother, however, did not expressly request permission to make the offer of proof by posing questions to the child. She merely requested permission to make "an offer of proof." To make an offer of proof, a party merely needs to provide "the substance of the evidence and the specific evidentiary basis supporting the admission of the evidence." *Thompson v. City of LaVergne*, No. M2003-02924-COA- R3-CV, 2005 WL 3076887, at *9 (Tenn. Ct. App. Nov. 16, 2005) (citing Tenn. R. Evid. 103(a)(2)). There are several methods by which a party can make an offer of proof. Although a preferred method is by questioning the witness, an accepted means of making an offer of proof is in the form of a summary statement by counsel of the excluded testimony. *Id.* (citing Neil P. Cohen, et al. *Tennessee Law of Evidence* § 103.4, at 20 (3d ed. 1995)). Other accepted methods include stipulating to the content of the excluded evidence or presenting a written summary of the excluded evidence. *Thompson*, 2005 WL 3076887, at *9. For reasons not apparent from the record, Mother did not employ any of these methods for making an offer of proof. Instead, she advised the court she had "nothing further" and closed her case in chief.

Based upon the foregoing, we have determined that the trial court expressly afforded Mother the opportunity to make an offer of proof. We have also determined it did not refuse a specific request to make an offer of proof by questioning the child. Accordingly, we find no error as it pertains to Mother's request to make an offer of proof as it pertained to the parties' twelve-year-old child.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Appellant, Martha Ines Hill.

_____

FRANK G. CLEMENT, JR., JUDGE